

MARK J. BENNETT 2672
Attorney General of Hawaii

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ROBYN M. KUWABE 3001
Deputy Attorney General
Department of Attorney
General, State of Hawaii
Labor Division
425 Queen Street
Honolulu, Hawaii 96813
Telephone: 586-1450

HAWAII LABOR
RELATIONS BOARD

Attorneys for Complainant NELSON B. BEFITEL,
Director of Labor and Industrial Relations

STATE OF HAWAII

HAWAII LABOR RELATIONS BOARD

In the Matter of) CASE NO. OSH 2007-14
) (Inspection No. 310387303)
DIRECTOR, DEPARTMENT OF LABOR)
AND INDUSTRIAL RELATIONS,) STIPULATION AND SETTLEMENT
) AGREEMENT; EXHIBIT A; APPROVAL
Complainant,) AND ORDER
)
vs.)
)
KAUAI NURSERY AND)
LANDSCAPING, INC.,)
)
Respondent.)

STIPULATION AND SETTLEMENT AGREEMENT

Complainant Nelson B. Befitel, Director of Labor and Industrial Relations

("Director") and Respondent KAUAI NURSERY AND LANDSCAPING, INC. ("Respondent")

having reached a full and complete settlement of the above-captioned contested case presently pending before the Hawaii Labor Relations Board ("Board") stipulate and agree as follows:

On or about December 8, 2006 through February 6, 2007, the Director, by and through the State of Hawaii's Occupational Safety and Health Division ("HIOSH"), inspected

Respondent's workplace located at 3-1550 Kaumualii Highway, Lihue, Hawaii 96766.

As a consequence of said inspection, the Director issued a Citation and Notification of Penalty on April 18, 2007 ("Citation") to Respondent alleging violations of the Hawaii Occupational Safety and Health Standards and assessed an aggregate penalty of \$3,500.00. See Exhibit A.

Respondent timely contested the Citation.

THEREFORE, to avoid the expense of litigation and to compromise and settle the above-captioned case, the parties, by and through their respective representatives, stipulate and agree as follows:

1. The Board has jurisdiction over this contested case pursuant to section 396-11, Hawaii Revised Statutes ("HRS").

2. At all relevant times, Respondent maintained a workplace at 3-1550 Kaumualii Highway, Lihue, Hawaii 96766.

3 At all relevant times, Respondent was an employer, as defined in HRS § 396-3, and employed employees, as defined in HRS § 396-3, and was therefore subject to the requirements of HRS chapter 396, the Hawaii Occupational Safety and Health Law.

4. Respondent agrees that it has abated each violation listed in the Citation in compliance with the abatement requirements under Hawaii Administrative Rule § 12-51-22.

5. The violations and corresponding characterizations as stated in the Citation are affirmed. See Exhibit A.

6. The Director reduces the aggregate penalty from \$3,500.00 to \$2,625.00 which shall be paid in full to the Director of Budget and Finance upon the execution of this Agreement. The penalty reduction is in consideration of the employer's efforts to prevent

reoccurrence of the hazard by ensuring more stringent enforcement of the company's safety program.

7. Respondent shall, within thirty (30) days after the filing of this Agreement, contact Consultation and Training at 830 Punchbowl Street, Room 425, Honolulu, Hawaii 96813; phone (808) 586-9100, and request a complete review of Respondent's safety and health situation.

8. Respondent agrees to cooperate fully with Consultation and Training.

9. If Respondent fails to fulfill any condition of this Agreement within the time stated, the original penalty of \$3,500.00 shall automatically and without further notice be reinstated and shall be final and conclusive and shall be treated as such with regard to any future citations the Director may issue against Respondent. All amounts shall be immediately due and owing. If Respondent fails to pay all penalties and the Director institutes legal action to collect on the outstanding amount due, Respondent agrees to pay all fees and costs, including reasonable attorney's fees, incurred to collect on the unpaid penalties. Any forbearance by the Director in exercising any right or remedy shall not be a waiver of or preclude the exercise of any right or remedy.

10. Except for the stipulated amendments described above, the Citation is confirmed in all other respects and upon approval by the Board, this Agreement and the Citation, as amended, shall become a final order of the Director.

11. Respondent shall post a copy of this Agreement and Order in a prominent place at or near the location of the posting of the Citation, and the Agreement and Order shall remain posted for three working days (excluding weekends and State holidays).

12. Respondent shall continue to comply with HRS chapter 396, the Hawaii

Occupational Safety and Health Law, and the related rules.

13. By entering into this Agreement, Respondent does not admit that it violated the cited standards for any litigation or purpose other than proceedings under the Hawaii Occupational Safety and Health Law.

14. Nothing in this Agreement shall bar the Director from taking any action regarding future acts or practices by Respondent which may be alleged to violate HRS chapter 396, the Hawaii Occupational Safety and Health Law, or the related rules.

DATED: Honolulu, Hawaii, 7/3/07.

KAUAI NURSERY AND LANDSCAPING, INC.



LELAN NISHEK
President/Owner

APPROVED AS TO FORM:

DIRECTOR OF LABOR AND
INDUSTRIAL RELATIONS



ROBYN M. KUWABE
Deputy Attorney General
Attorney for Director of Labor and
Industrial Relations, State of Hawaii



NELSON B. BEFITEL


APPROVED AND SO ORDERED BY
HAWAII LABOR RELATIONS BOARD:

ORDER NO. 251

DATED: July 12, 2007



JIM NICHOLSON, Chair

EMORY J. SPRINGER, Member

SARAH R. HIRAKAMI, Member

State of Hawaii
Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division
830 PUNCHBOWL STREET, ROOM 425
Honolulu, HI 96813
Phone: (808) 586-9110 FAX: (808) 586-9104



Certified Number: 7003 1680 0000 9997 3509

Citation and Notification of Penalty

To:
Kauai Nursery and Landscaping Inc
and its successors
3-1550 Kaumualii Hwy
Lihue, HI 96766

Inspection Number: 310387303 (Ray Mishima)

Inspection Date(s): 12/08/2006 - 02/06/2007

Issuance Date: 04/18/2007

OSHC ID: Y5214

Optional Report No.: 01507

Inspection Type: FATCAT

Scope of Inspection: Comprehensive Inspection

Inspection Site:
3-1550 Kaumualii Hwy
Lihue, HI 96766

The violation(s) described in this Citation and Notification of Penalty is (are) alleged to have occurred on or about the day(s) the inspection was made unless otherwise indicated within the description given below.

This Citation and Notification of Penalty describes violations of the Hawaii Occupational Safety and Health Law. The penalty(ies) listed herein is (are) based on these violations. You must abate the violations referred to in this Citation by the dates listed and pay the penalties, unless within 20 calendar days from your receipt of this Citation and Notification of Penalty, you mail a notice of contest to the State of Hawaii Occupational Safety and Health Division (HIOSH) at the address shown above. Please refer to the enclosed booklet (Employer Rights and Responsibilities Following a HIOSH Inspection) which outlines your rights and responsibilities and which should be read in conjunction with this form. Issuance of this Citation does not constitute a finding that a violation of the Law has occurred unless there is a failure to contest as provided for in the Law or, if contested, unless this Citation is affirmed by the Hawaii Labor Relations Board (HLRB) or a court.

Posting - The law requires that a copy of this Citation and Notification of Penalty be posted immediately in a prominent place at or near the location of the violation(s) cited herein, or, if it is not practicable because of the nature of the employer's operations, where it will be readily observable by all affected employees. This Citation must remain posted until the violation(s) cited herein has (have) been abated, or for 3 working days (excluding weekends and State holidays), whichever is longer. The penalty dollar amounts need not be posted and may be marked out or covered up prior to posting.

Informal Conference - An informal conference is not required. However, if you wish to have such a conference you may request one with the Administrator during the 20 calendar day contest period. During such an informal conference, you may present any evidence or views which you believe would support an adjustment to the citation(s) and/or penalty(ies).

If you are considering a request for an informal conference to discuss any issues related to this Citation and Notification of Penalty, you must take care to schedule it early enough to allow time to contest after the informal conference, should you decide to do so. Please keep in mind that a written letter of intent to contest must be submitted to the Administrator within 20 calendar days of your receipt of this Citation. The running of this contest period is not interrupted by an informal conference.

If you decide to request an informal conference, please complete, remove and post the page 4, Notice to Employees next to this Citation and Notification of Penalty as soon as the time, date, and place of the informal conference have been determined. Be sure to bring to the conference any and all supporting documentation of existing conditions as well as any abatement steps taken thus far. If conditions warrant, we can enter into an informal settlement agreement which amicably resolves this matter without litigation or contest.

Employers' Right to Contest - You have the right to contest this Citation and Notification of Penalty. You may contest all citation items or only individual items. You may also contest penalties and/or abatement dates without contesting the underlying violations. Unless you inform the Administrator in writing that you intend to contest the citation(s) and/or penalty(ies) within 20 calendar days after receipt, the citation(s) and the penalty(ies) will become a final order of the Department of Labor and Industrial Relations and may not be reviewed by any court or agency. Once a letter of contest is received, it becomes the jurisdiction of the HLRB.

Penalty Payment - Penalties are due within 20 calendar days of receipt of this notification unless contested. Make your check or money order payable to "Director of Budget and Finance." Please indicate the Inspection Number on the remittance.

HIOSH does not agree to any restrictions or conditions or endorsements put on any check or money order for less than the full amount due, and will cash the check or money order as if these restrictions, conditions, or endorsements do not exist.

Notification of Corrective Action - For each violation which you do not contest, you are required by Section 12-51-22 to submit an Abatement Certification to HIOSH. The certification must be sent by you within 5 calendar days of the abatement date indicated on the citation. For **Willful and Repeat** violations, documents (example: photos, copies of receipts, training records, etc.) demonstrating that abatement is complete must accompany the certification. Where the citation is classified as **Serious** and the citation states that abatement documentation is required, documents such as those described above are required to be submitted along with the abatement certificate. If the citation indicates that the violation was corrected during the inspection, no abatement certification is required for that item.

All abatement verification documents must contain the following information: 1) Your name and address; 2) the inspection number (found on the front page); 3) the citation and citation item number(s) to which the submission relates; 4) a statement that the information is accurate; 5) the signature of the employer or employer's authorized representative; 6) the date the hazard was corrected; 7) a brief statement of how the hazard was corrected; and 8) a statement that affected employees and their representatives have been informed of the abatement.

The law also requires a copy of all abatement verification documents, required by Section 12-55-22 to be sent to HIOSH, also be posted at the location where the violation appeared and the corrective action took place.

Employer Discrimination Unlawful - The law prohibits discrimination by an employer against an employee for filing a complaint or for exercising any rights under this Act. An employee who believes that he/she has been discriminated against may file a complaint no later than 60 days after the discrimination occurred with the Hawaii Occupational Safety and Health Division at the address shown above.

Employer Rights and Responsibilities - The enclosed booklet (Employer Rights and Responsibilities Following a HIOSH Inspection) outlines additional employer rights and responsibilities and should be read in conjunction with this notification.

Employees' Right to Contest - The law gives an employee or his/her representative the opportunity to object to any abatement date set for a violation if he/she believes the date to be unreasonable. The contest must be mailed to the Hawaii Occupational Safety and Health Division at the address shown above and postmarked within 20 calendar days of the receipt by the employer of this Citation and Notification of Penalty.

Inspection Activity Data - you should be aware that OSHA publishes information on its inspection and citation activity on the Internet under the provisions of the Electronic Freedom of Information Act. The information related to your inspection will be available 30 calendar days after the Citation Issuance Date. You are encouraged to review the information concerning your establishment at WWW.OSHA.GOV. If you have any dispute with the accuracy of the information displayed, please contact this office.



NOTICE TO EMPLOYEES OF INFORMAL CONFERENCE

An informal conference has been scheduled with HIOSH to discuss the citation(s) issued on 04/18/2007. The conference will be held at the HIOSH office located at 830 PUNCHBOWL STREET, ROOM 425, Honolulu, HI 96813 on _____ at _____. Employees and/or representatives of employees have a right to attend an informal conference.

STATE OF HAWAII

Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division

Inspection Number: 310387303
Inspection Dates: 12/08/2006 - 02/06/2007



830 Punchbowl Street, Room 425
Honolulu, HI 96813

Issuance Date: 04/18/2007

Citation and Notification of Penalty

Company Name: Kauai Nursery and Landscaping Inc
Inspection Site: 3-1550 Kaumualii Hwy, Lihue, HI 96766

The alleged violations below (1a, 1b & 1c) have been grouped because they involve similar or related hazards that may increase the potential for illness or injury resulting from an accident.

Citation 1 Item 1a Type of Violation: **Serious**

HAR §12-60-2(a)(3) was violated because:

~~The employer did not provide safe work place and practice when the employees utilize and ride vehicles on the~~ property. The employees were allowed to ride in the van that was not equipped with passenger seats, and with the van sliding door in the open position, thus exposing the employees to a moving fall hazard which could result in serious injuries or death.

§12-60-2(a)(3) states "Every employer shall provide safe work places and practices by elimination or reduction of existing or potential hazards. Elimination of existing or potential hazards by design, process substitution, or other appropriate methods is preferred because it eliminates the need for further employee protection. When elimination is not feasible, reduction of existing or potential hazards to acceptable levels, using methods such as engineering or administrative controls, isolation, or guarding, shall be promptly used. When these methods are inadequate to reach acceptable levels, personal protective equipment shall be provided and used."

Location: Establishment

Abatement documentation, such as written, videographic or photographic evidence of abatement is required.

Date By Which Violation Must be Abated:
Penalty:

04/23/2007
\$3,500.00

See pages 1 through 3 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

STATE OF HAWAII

Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division

Inspection Number: 310387303
Inspection Dates: 12/08/2006 - 02/06/2007



830 Punchbowl Street, Room 425
Honolulu, HI 96813

Issuance Date: 04/18/2007

Citation and Notification of Penalty

Company Name: Kauai Nursery and Landscaping Inc
Inspection Site: 3-1550 Kaumualii Hwy, Lihue, HI 96766

Citation 1 Item 1b Type of Violation: **Serious**

HAR §12-60-2(b)(1)(B)(i) was violated because:

The company did not have any written policies, procedures or practices when vehicles are used on the property. The employees were allowed to ride in a van that had no passenger seats, restraints, and with the sliding door in the open position. When the driver made a 90 degree left turn this cause the employee to fall out from the moving van which resulted in the fatality.

§12-60-2(b)(1)(B)(i) states "The program should forth policies, procedures, and practices that recognize and protect employees from occupational safety and health hazards."

Location: Establishment 70 acres

Abatement documentation, such as written, videographic or photographic evidence of abatement is required.

Date By Which Violation Must be Abated:

05/21/2007

See pages 1 through 3 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

STATE OF HAWAII

Department of Labor and Industrial Relations
Hawaii Occupational Safety and Health Division

Inspection Number: 310387303
Inspection Dates: 12/08/2006 - 02/06/2007



830 Punchbowl Street, Room 425
Honolulu, HI 96813

Issuance Date: 04/18/2007

Citation and Notification of Penalty

Company Name: Kauai Nursery and Landscaping Inc
Inspection Site: 3-1550 Kaunualii Hwy, Lihue, HI 96766

Citation 1 Item 1c Type of Violation: **Serious**

HAR §12-60-2(b)(03) was violated because:

The company did not conduct periodic safety and health inspections of the employees' work site nor were there any written documentation that periodic inspections were conducted, which could have prevented serious injuries or deaths.

~~§12-60-2(b)(3) states: "The employer shall conduct periodic in-house safety and health inspections so that new or previously missed hazard or failure in engineering, work practices, and administrative controls are identified. The in-house inspections will be conducted by individuals who are trained to recognize hazardous conditions, as members of the safety and health committee or person designated and trained by the employer for the facility's safety and health program."~~

Location: Jobsite

Abatement Documentation Required

Date By Which Violation Must be Abated: 05/21/2007

NELSON B. BEFTEL
DIRECTOR

See pages 1 through 3 of this Citation and Notification of Penalty for information on employer and employee rights and responsibilities.

State of Hawaii
Department of Labor and Industrial Relations
HAWAII OCCUPATIONAL SAFETY AND HEALTH DIVISION
830 PUNCHBOWL STREET, ROOM 425
Honolulu, HI 96813

SUMMARY OF PENALTIES

Company Name: Kauai Nursery and Landscaping Inc
Inspection Site: 3-1550 Kaumualii Hwy
Lihue, HI 96766
Issuance Date: 04/18/2007

Summary of Penalties for Inspection Number 310387303

Citation 01, Serious	=	\$3,500.00
TOTAL PENALTIES	=	\$3,500.00

Make check or money order payable to the "Director of Budget and Finance." Please indicate the inspection number and dba, if company name is different, on the remittance. A fee of \$15.00 will be charged for any returned checks.

If receipt is desired, please indicate with payment; otherwise, your cancelled check will be your receipt.

SENDER: COMPLETE THIS SECTION		COMPLETE THIS SECTION ON DELIVERY	
<p>■ Complete items 1, 2, and 3. Also complete item 4, if Restricted Delivery is desired.</p> <p>■ Print your name and address on the reverse so that we can return the card to you.</p> <p>■ Attach this card to the back of the mailpiece, or on the front if space permits.</p>		<p>A. Signature x <i>[Signature]</i></p> <p>B. Received by (Printed Name) <i>Shelton Nabeshima</i></p> <p>C. Date of Delivery <i>4/18/07</i></p> <p>D. Is delivery address different from item 1? If YES, enter delivery address below</p>	
<p>1. Article Addressed to: 310387303</p> <p>Mr. Jerry Nishek Corporate Secretary/Treasure Kauai Nursery and Landscaping 3-1550 Kaumualii Highway Lihue, Hawaii 96766</p>		<p>3. Service Type <input checked="" type="checkbox"/> Certified Mail <input type="checkbox"/> Registered <input type="checkbox"/> Insured Mail <input type="checkbox"/> Express Mail <input type="checkbox"/> Return Receipt for Merchandise <input type="checkbox"/> C.O.D.</p>	
<p>2. Article Number (Transfer from Service label)</p>		<p>4. Restricted Delivery? (Extra Fee) <input type="checkbox"/> Yes</p>	
<p>PS Form 3811, February 2004</p>		<p>Domestic Return Receipt</p>	

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For delivery information visit our website at www.usps.com	
OFFICIAL USE	
<p>Safety Postage \$.87</p> <p>Certified Fee 2.40</p> <p>Return Receipt Fee (Endorsement Required) 1.85</p> <p>Restricted Delivery Fee (Endorsement Required)</p> <p>Total Postage & Fees \$ 5.12</p>	<p>310387303</p> <p>APR 18 2007</p> <p>USPS</p>
<p>Sent To Kauai Nursery and Landscaping Inc. Street, Apt. No., or PO Box No. 3-1550 Kaumualii Highway City, State, ZIP+4[®] Lihue, Hawaii 96766</p>	
<p>PS Form 3800, June 2002</p>	